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Effect of the International Agreement on Government Procurement and the Government Procurement Chapter of the North American Free Trade Agreement on public contracting opportunities

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THESIS

EFFECT OF THE INTERNATIONAL AGREEMENT ON GOVERNMENT PROCUREMENT AND THE GOVERNMENT PROCUREMENT CHAPTER OF THE NORTH AMERICAN FREE TRADE AGREEMENT ON PUBLIC CONTRACTING OPPORTUNITIES

by

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June, 1994

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This paper explores the specific legal content of the 1979 and 1993 Agreements on Government Procurement as well as the North American Free Trade Agreement's Chapter Ten (Government Procurement). One chapter addresses the use of free trade agreements, associated problems, and how the agreements have been applied to the public sector. The content of each of the primary documents is analyzed and comparisons made between the documents where applicable. Available data and studies are reviewed to determine the effect of the 1979 Agreement on Government Procurement on the current magnitude of public procurement contracts and the possible effects on the future bidding potential for suppliers of goods and services in the international government procurement marketplace. Finally, the prospect for the continued influence of free trade agreements on public sector contracting is examined.

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ABSTRACT

This paper explores the specific legal content of the 1979 and 1993 Agreements on Government Procurement as well as the North American Free Trade Agreement's Chapter Ten (Government Procurement). One chapter addresses the use of free tr[illegible]g[illegible]ments, associated problems, and how the agreements have been applied to the public sector. The content of each of the primary documents is analyzed and comparisons made between the documents where applicable. Available data and studies are reviewed to determine the effect of the 1979 Agreement on Government Procurement on the current magnitude of public procurement contracts and the possible effects on the future bidding potential for suppliers of goods and services in the international government procurement marketplace. Finally, the prospect for the continued influence of free trade agreements on public sector contracting is examined.

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I. INTRODUCTION

A. GENERAL

This paper examines the Agreement on Government Procurement (AGP) and the changes that have been made to the Government Procurement Code (GPC) as a result of the General Agreement on Tariffs and Trade (GATT) signed in December 1993 at the conclusion of the Uruguay Round of international trade talks. Additionally, the government procurement chapter of the North American Free Trade Agreement (NAFTA) is discussed. What impact has the original AGP had, and what will be the impact of the new agreements?

Almost all governments are concerned not only with acquiring goods and services, but with achieving economic objectives that can be brought about by large government purchases. As a result, protectionist buy-national policies such as the Buy America Act (BAA) have been developed on the belief that preferential treatment for domestic suppliers will yield more economic benefit at home. The contrary philosophy behind GATT and NAFTA is to utilize what economists term the "Law of Comparative Advantage" to obtain maximum economic benefit (Peterson 1980). This philosophy contends that all trading partners will gain when they respectively specialize in producing items where they are most efficient. Efficient

producers will sell their products while correspondingly spending their income to obtain items that they are less efficient in producing. Even in situations where a purchaser possesses an absolute advantage in production, it is beneficial for that purchaser to trade with a partner who has a comparative advantage so the purchaser can then concentrate on other areas of production where they hold a comparative advantage. Economists almost unanimously believe that the end result of everyone specializing and trading in such a manner is that employment and economies will expand as a result of a multiplier effect and all parties will be better off (Gwartney 1992).

The Agreement on Government Procurement (AGP) also known as the Government Procurement Code (GPC or "the Code") under the sponsorship of the General Agreement on Tariffs and Trade (GATT) has served to promote free trade and reduce domestic supplier preference in government procurement for 20 signatory nations and 28 more designated Third World nations. The AGP was implemented in the United States by the Trade Agreement Act (TAA) of 1979. A new GPC was agreed upon in December 1993 at the Uruguay Round of international trade talks and will take effect in 1996 . NAFTA'S government procurement chapter was also agreed upon in 1993.

B. OBJECTIVES

This paper primarily explores the specific legal content of the 1979 and 1993 Agreements on Government Procurement as well as Chapter Ten of the 1993 North American Free Trade Agreement. The content of each is analyzed and comparisons between the agreements are made where they are informative.

Available data and studies are reviewed to determine the effect of the 1979 Agreement on Government Procurement on the current magnitude of public procurement contracts, the possible effects on the future volume of international government contracts, and finally the potential total worldwide public market opportunities available. This research will discuss the principal documents and analyze their impact on trade opportunities.

C. RESEARCH QUESTIONS

The primary research question is: Based on historical data, what is the probable effect on trade opportunities of the North American Free Trade Agreement's government procurement chapter and the Government Procurement Code of the Uruguay Round of the General Agreement on Tariffs and Trade?

The following subsidiary research questions were developed to support the primary question and to develop a detailed knowledge of the international government procurement field:

(1) What are the purposes of NAFTA and GATT?

(2) What are the specific features of NAFTA's government procurement chapter and of the AGP?

(3) What similarities and differences exist between A) the 1979 AGP, B) NAFTA's government procurement chapter and C) the 1993 AGP?

(4) What is the effect of the Buy American Act on intended trade objectives of NAFTA and GATT?

(5) Has the 1979 AGP been successful in increasing international trade opportunities?

D. RESEARCH METHODOLOGY

Information was obtained from varied sources including the primary legal documents. Books, periodicals, news releases, studies, and Congressional hearings were obtained through the Naval Postgraduate School Library, the Monterey Institute of International Studies, Stanford University's Law and Graduate Business Libraries, Hastings Law Library, the Secretariat of the General Agreement on Tariffs and Trade, and the University of California, Santa Cruz Library.

Significant information including press releases, pamphlets, statistical data and studies were obtained through the Office of the United States Trade Representative (USTR). Contact was made early in the process with Mr. Mark Linscott, the Director of International Government Procurement Policy at USTR and chief U.S. negotiator on the Agreement on Government Procurement during the later stages of the Uruguay Round. His insights and interpretations were regularly obtained through phone calls and a face-to-face interview in Washington, D.C.

E. ORGANIZATION OF THE RESEARCH

This thesis is divided into six chapters. This chapter provides the general objectives of the study as well as the research methodology which was utilized.

Chapter II reviews the theoretical concept of free trade and how international trade agreements have been used to help open international markets.

Chapter III reviews the terms of the primary legal documents and compares their features.

Chapter IV presents and analyzes available data regarding the effectiveness of the 1979 Agreement on Government Procurement, and potential contract opportunities available in the world government procurement market.

Chapter V presents conclusions and recommendations regarding the current effectiveness of international government procurement agreements and associated data collection as well as their future prospects.

F. SCOPE, LIMITATIONS AND ASSUMPTIONS

The thesis presents the content of existing documents and provides interpretations from credible sources. No original surveys are used to obtain procurement data for this study. This paper only makes use of existing data regarding international government procurement due to the overwhelming volume of procurement information and the variability of national procurement data collection systems coverage.

Research for this thesis was conducted in a real time environment -- the new AGP was still unresolved until April 15, 1994, and NAFTA's government procurement chapter was put into place during the research period. While general GATT and NAFTA issues have been openly and widely debated, there has been little discourse specifically related to government procurement. Accordingly, the greatest credence has been placed on the information regarding the recent agreement as presented by the principal governmental parties such as the USTR and the European Union (EU).

Additionally an attempt has been made to incorporate as much as possible of the sparse independent body of knowledge concerning the 1979 AGP. The original intent of this research was to present and analyze previously unpublicized USTR data regarding public procurement. While USTR graciously provided recent data, it represented nationally centered information without even remotely uniform baselines from country to country. This thesis will emphasize more refined data from the Deloitte and Touche study used by the U.S. and EC during the closing stages of the Uruguay Round negotiations. The reader is assumed to have a basic knowledge of acquisition terminology throughout this thesis.

II. FOUNDATION AND HISTORY OF TRADE AGREEMENTS

A. THE FOUNDATION FOR TRADE AGREEMENTS

1. Comparative Advantage and Specialization

International Trade has existed for thousands of years so that goods and services may be exchanged between people. However, it was not until 1776 that the logical benefit of free trade was succinctly stated by Adam Smith in The Wealth of Nations:

> It is the maxim of every prudent master of a family, never to attempt to make at home what it will cost him more to make than to buy.... If a foreign country can supply us with a commodity cheaper than we ourselves can make it, better buy it of them with some part of the produce of our own industry, employed in a way in which we have some advantage(Blinder).

The "Law of Comparative Advantage" as put forth by Smith has been and is the basis for international trade agreements (Peterson p. 326). Smith used the timely example of English wool and Portuguese wine to illustrate his point. The English were more efficient in producing woolens because they had ideal conditions for raising sheep. The Portuguese climate by contrast was appropriate for vineyards. Consequently England and Portugal specialized in supplying the item where each had the most efficient production, wool and wine respectively. As

England could produce more wool and Portugal more wine through specialization, there was ultimately more wine and wool available. Trade was the mechanism used to exchange the larger amount of goods. This more efficient production that allowed for distribution to either England or Portugal served to increase the living standard in both countries and facilitated further specialization and economic growth in other markets.(Rothbard) This principle of comparative advantage and specialization is the basis for free trade agreements (Peterson, p. 326).

2. Governments and Free Trade

If there was no government involvement in trade policies, a condition of free trade would exist. While all trade is ultimately among individuals, the same logic applies to governments, nations, and regions. In a free trade environment, producers and consumers can be as likely to be brought together across national boundaries as across state or local borders. Governments, however have sometimes chosen to pad their treasuries with external revenue from tariffs or to erect barriers meant to protect worried, greedy, or uncompetitive domestic industries. (Rothbard)

3. The Need for International Trade Agreements

The potential for misunderstandings among international trading partners is enormous. Disputes are inevitable in all trading relationships. This basic conflict,

however, can be exacerbated by part of the unique set of features peculiar to international trade: language, distance, currency, culture, and business practices. Adding to this friction in the international marketplace is the element of government protectionist intervention, which is likely to be perceived as preferential or unfair. Over the years, bilateral and multilateral trade organizations and agreements have been set up to deal with the peculiar complexities of international trade (Rothbard). In general, their goals have been to keep world markets open so that members can benefit through a linked economy that expands in the aggregate due to specialization and comparative advantage trading (Peterson, p. 326).

B. DEVELOPMENT OF THE AGREEMENT ON GOVERNMENT PROCUREMENT

1. Protectionism and Buy Domestic Policies

a. Smoot-Hawley Tariff Act

The formation of free trade agreements as they relate to government procurement is rooted in the "buy-domestic" movement of the early 1930's. In 1930, Congress passed the Smoot-Hawley Tariff Act establishing the highest tariff levels in U.S. history. This Act was passed in direct response to buy-British clauses being placed in nearly all British public contracts (Goehle).

b. Buy American Act

Subsequently, protectionist sentiment led to the passage of the Buy American Act (BAA) in 1933. Its enactment resulted from the existing clamor to reduce unemployment and domestic manufacturers' concerns about foreign competition, but it was also motivated by the lingering desire to retaliate against other nations' buy-domestic policies. The BAA prohibited the purchase of foreign products and specified general rules of origin, but it allowed waivers for various reasons. The BAA was frequently criticized through the years because the waivers were inconsistently applied by government agencies. A 1954 Executive Order specified BAA discrimination more directly by establishing a rule of origin requiring that at least 50 percent of a U.S. product's aggregate cost was from American sources.[1] The 1954 Order also established offsets of six to 16 percent to be used in judging foreign bids against domestic bids (Peterson). In 1962, the basic six percent preference was increased to 50 percent for defense procurements (Pomeranz).

c. Buy-domestic Policies Abroad

Buy-domestic policies in other countries took on less transparent methods after the Depression. There was a marked tendency in European countries to prefer domestic

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[1] A "rule of origin" is the criteria used to determine the nationality of a product or service for contract award purposes.

suppliers. European governments' widely dispersed procurement functions (relative to the American system) allowed contracting officials great autonomy in choosing local suppliers. To compound transparency concerns further, almost no tenders were openly advertised, or they were offered to a selective list of bidders. (Peterson)[2]

d. Establishment of GATT

While buy-domestic policies were still in place, the importance of one of their major goals--to reduce unemployment--waned after the Great Depression. Protectionist trade policies became more commonly noted as a cause of the Great Depression. Governments began to seek the efficient allocation of world resources that were touted to be available through less restricted international free trade. The General Agreement on Tariffs and Trade (GATT), formed as a temporary organization in 1947 by 23 nations, was an outgrowth of this change in philosophy. Its vision was for "most favored nation" (MFN) arrangements which advocated nondiscrimination in trade among members (Jackson, p. 208). GATT helped reduce and eliminate many tariffs and trade barriers during the first

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[2] The term *tender* has a dual meaning in the international procurement sector. While a *tender* is synonymous with the solicitation (i.e., IFB, RFP, etc.), it is also used to label the entire respective procurement process (i.e., *open tender, selective tender,* and *single tender*). (Sherman, p.339)

Rounds of Multilateral Trade Negotiations (MTN).[3] GATT is the preeminent international trade organization. Since its beginnings it has sponsored accords preventing discrimination in commercial trade among signatory governments. However, it did not formally address government procurement until the Tokyo Round which ended in 1979 (Peterson).

2. Beginnings of a Government Procurement Code

a. The OECD Forum

The Organization for Economic Cooperation and Development (OECD) was formed in 1961 by nearly all of the industrialized free market nations of the world to enhance economic and social welfare among members and developing nations (Rothbard). Although the OECD was not intended to issue trade regulations, one of its purposes was to be a forum for trade issues including discriminatory practices.

In 1962, Belgium and the United Kingdom brought forth a complaint alleging procurement discrimination on the part of the U.S. through the Buy American Act and specifically its 50 percent defense offset. The OECD investigated the complaint and issued their findings in 1964. At that point, the U.S. delegate assented to study the case further and

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[3]The Multilateral Trade Negotiations or "MTN" are the periodic trade discussions used to formulate GATT policies and agreements. There have been eight such rounds through the years. The "Tokyo Round", held from 1973-1979 generated the 1979 AGP, and the "Uruguay Round", held from 1986 to 1993 produced the 1993 AGP (Low, pp.173, 209).

succeeded in steering the OECD investigative committee's purpose to one of reviewing overall government procurement procedures among member nations (Pomeranz).

b. OECD Review of Government Procurement

The OECD secretariat issued a summary of members' government procurement processes in 1966. It basically reported that many countries were engaging in discriminatory public procurement--not just the United States. The report confirmed that "the United States stated clearly visible percentage preferences for domestic suppliers, whereas most other countries use highly invisible, administrative procurement practices and procedures to achieve the 'buy national' result" (Pomeranz, p. 1272).

Subsequently the OECD started to draft a set of government procurement "guidelines." A 1967 draft text was objected to by the U.S. largely because it removed offsets and did not ensure open tendering in other countries. The U.S. countered with a 1969 draft that used a single market -- the heavy electrical equipment sector -- as a starting point for crafting more complete government guidelines. The U.S. draft signaled the beginning of eight years of OECD negotiations (Pomeranz, p.1275).

Almost all critical government procurement issues were addressed and in some cases resolved during the negotiations. The OECD process defined much of what would

become the Agreement on Government Procurement. Key topics of the negotiations are addressed below.

- One of the first revelations was that countries would be unwilling to open a domestic market unless another country reciprocated accordingly. A consensus thus developed for a conditional most-favored-nation agreement where advantages would only accrue to those who also took on obligations.
- Rules of origin were discussed and then dismissed because of the extreme variance in rules between countries.
- The OECD negotiations defined tendering procedures and generally applied them to existing domestic processes.
- The issue of procurement thresholds was addressed with the U.S. pushing for low thresholds to gain EC business and the EC resisting.
- Procedures to make procurements as open as possible were discussed. "Transparence" concerns were generally resolved early in the negotiations.

In 1977, OECD government procurement negotiations were transferred to the GATT for incorporation into the Tokyo Round of Multilateral Trade Negotiations. The OECD executed the transfer to utilize MTN's broader forum and to encourage the possible inclusion of developing nations. The OECD had drafted text that would in essence become GATT's Government Procurement Code (Pomeranz, pp. 1264-1279). MTN finalized the text by 1979 and the Agreement on Government Procurement was signed.

3. The Agreement on Government Procurement

Since 1979, GATT's Government Procurement Code has stood as the primary multilateral accord addressing public

procurement. Debate concerning international government procurement inevitably comes back to the Code. It served as the basis for the North American Free Trade Agreement's government procurement chapter signed in 1992 and the new Agreement on Government Procurement signed in 1993. Many of the same issues addressed by the OECD were reviewed again or developed further to craft the new agreements.

III. DOCUMENT REVIEW

The Government Procurement chapter of the NAFTA and the Agreements on Government Procurement from both 1979 and 1993 are rooted in the principle of reciprocity among the signatories. The three accords attempt to establish and impose basic requirements in conducting public procurement. Each participating country is expected to conform to agreement terms and in turn can expect other members to treat them similarly. Generally, the terms of the agreements concentrate upon openness, transparency, and competition, as well as fair bid challenge procedures. Particularly in the case of the 1993 AGP, major debate has revolved around the annexes to the agreements which delineate the specific government entities to be included under the codes (Linscott). This chapter will initially review the important features of the 1979 AGP and then compare its features to the 1993 AGP and NAFTA's Chapter Ten. A discussion of issues relevant to each document is included in each section.

A. The 1979 Agreement on Government Procurement

1. 1979 AGP Purpose, Scope and Coverage

The 1979 AGP is comprised of a preamble, nine articles and four annexes. The articles contain rules, procedures and

policies, while the annexes list the procurement entities subject to the rules. The GPC provides that signatories will give equal treatment to foreign and domestic suppliers in competitions for certain contracts offered by specifically listed central government entities. Customs duties are excluded from this nondiscrimination provision. The AGP only covers purchases of products above 150,000 Special Drawing Rights (SDRs). (An SDR is a variable monetary unit which is approximately equivalent to $1.30 today. It is used by GATT to provide a uniform financial standard for international trade calculations). Procurement of services is not included under the Agreement. The Act also excluded purchases involving 1) national security and war materials, 2) small business preferences, 3) research and development, 4) construction projects, 5) Army Corps of Engineers requirements, 6) resale items, 7) Federal Prison Industries and Blind and Other Severely Handicapped program items, 8) lease or rental agreements, and 9) non-designated countries' requirements (Golub, p.588).

2. U.S. Implementation of the 1979 AGP

The President has the authority to waive the Buy American Act (BAA) under the Trade Agreements Act of 1979 (TAA). This can also be accomplished for even non-signatories of the AGP who are willing to provide reciprocal opportunities and for the least developed countries of the world (Peterson,

p. 339). The TAA provides the President with the ability to reward a reciprocating country for compliance by waiving the BAA and to punish non-compliers by invoking it (Pomeranz, pp. 1293-1298).

3. Rules of Origin

The 1979 AGP's relatively vague rule of origin asserts that an article is generated by the country where it was either "wholly produced and manufactured" or, for articles of some foreign content, the product has been "substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed." This definition is at odds with existing domestically used formulas. For example, the BAA requires that 50 percent of the "aggregate cost" of an item must be domestic cost to be regarded as a U.S. product. (OFPP Report, 1990) (Although Japan and most EC countries technically do not have buy-national programs (and hence the need for rules), they appear to generally assess where a bidder is headquartered and operating to apply observed domestic preferences.)

4. Transparence and Tendering Procedures

The 1979 AGP is intended to be "transparent," i.e., procurements must be open and predictably administered under AGP standards. Accordingly, the system is designed to be self-policing. It closely resembles U.S. Government

procurement policies and does not represent much of a change in the daily routine of American procurement personnel. For other countries, the AGP's Government Procurement Code (GPC) provides the only formal procurement guidance available. Some of the GPC's uniform, nondiscriminatory procurement procedures that ensure transparence are listed below:

- Technical contract specifications issued under the AGP are required to promote competition and not present obstacles to international trade. They must use performance rather than design criteria, actively employ international standards and use brand-name-or-equal specifications as a last resort.
- AGP members must publish their procurement rules and regulations.
- Strict procedures for bid submission, opening, and award are delineated including the requirement for written bids and/or written confirmations after telegraphic bids.
- Information relating to proposed purchases and actual tenders should include sufficient data for international bidders to respond. Such data include schedule, payment, delivery date, bid closing date, language requirements, and technical, financial, and performance requirements.
- Procurement information will be published in one of the "GATT languages"--English or French.
- The GPC encourages open tenders (full and open competition), followed by selective tenders (bidders must prequalify), but discourages single tenders (sole source procurements) (Sherman, 1991).[4]
- Unsuccessful bidders must be notified in writing within seven days after award; briefings are required for interested unsuccessful offerors who request such information.

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[4]In sole source procurements, only one bidder is solicited. This method is most appropriately applied when a particular bidder possesses a unique ability to meet minimum contract requirements.

- Contracts are awarded to the lowest price bidder or the one that best meets the terms of the tender.
- Invitations must be extended to the maximum number of foreign and domestic suppliers.
- Bidder qualification must be open and bidders' lists published
- A 30 day bid response time is required to allow bidders sufficient time to prepare to compete. (The time was altered to 40 days as a result of a 1988 protocol.)
- Annual statistical reports are required to be submitted by member nations detailing the value and number of contracts awarded above and below $150,000 SDRs, and sole source (single tender) procurements.

(Anthony,pp.1301-1343)(Peterson,pp.321-348)(Fiaschetti,pp. 1345-1358)(Pomeranz,pp.1263-1300)(Morgan,pp.1-13) (1979 AGP)

5. Bid Challenges

Dispute settlement under the AGP requires a member nation to present complaints before a designated committee for decision. Under the enforcement provisions, private individuals must request that their government intercede on their behalf if they have evidence of an unfair procurement. Private individuals and businesses cannot present a case directly before the committee. They must be sponsored by their country (Linscott). The signatories also agreed to meet annually to discuss enforcement provisions and general objectives of the Agreement. (Peterson, p.345).

6. Special Treatment for Developing Nations

The AGP provides preferential treatment to countries listed by the GATT as developing nations. In essence, they

are regarded as AGP members without becoming signatories. The goal is to safeguard their balance of payments position while establishing domestic industries and improving economic growth through mutually beneficial regional and global arrangements. Generally, it provides AGP nations with a foot in the door for potentially large future markets in the targeted countries (Anthony, p.1315-1318).

7. Compliance and Evaluation Concerns

All parties to the AGP, including the United States, have been responsible to at least some degree for problems experienced with the Agreement since 1979. A basic concern is that few businesses are aware of it and most are ill-equipped to take advantage of it. In addition, foreign governments have not significantly opened procurements to international competition, measured either as the number of open contracts or their value. Much of this omission results from the high monetary threshold levels required to invoke the AGP; small purchases are effectively precluded from international bidding. In addition, sole source and set-aside procurements are exempted in signatory countries.[5] There are also undeniable instances of noncompliance--such as not allowing 30 days for bid submission and writing non-competitive specifications--which essentially bar non-domestic bidders.

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[5]"Set-asides" refer to contracts reserved for certain bidders. For example, a designated volume of government procurement is reserved for small businesses in the U.S.

The AGP's impact on the size of the government procurement market has been overestimated. Some advertised gains merely reflect the status quo while foreign firms basically cannot capture others. Worldwide fuel purchases are already open to foreign competition from limited suppliers, yet were misrepresented as potential new gains. In other cases, bilateral agreements opening procurements to international tendering were in place before the AGP. Furthermore, non-domestic businesses cannot be truly competitive at providing products such as office furniture and supplies because of the transportation costs imbedded in their proposals. Finally, most foreign bidders are hard pressed to meet even a 30-day proposal window given their traditional tendering methods and language barriers.

Monitoring, assessing, and correcting noncompliance issues has been undependable for all signatories at best. Collecting data about compliance is difficult, and the data collected are inconsistent and basically incomplete. The United States recognized that embassies and American businesses abroad were in the best position to observe noncompliance, but both groups were unqualified or unwilling to bring the problems to light. Businesses feared reprisals from their host nations. Both State Department and business representatives also expressed doubts about their ability to detect infractions, such as a foreign government's splitting a procurement to avoid an AGP threshold. Even when

noncompliance allegations have arisen, there has been apparently little expectation that the AGP's cumbersome and subjective dispute settlement mechanism would provide satisfaction. (GAO Report 1984)

Norway's inappropriate award of an automated tollbooth system illustrates the problems involved with protesting an unfair award under the AGP. Norway awarded a domestic concern a large tollbooth contract for "research and development of a new technology" involving a municipal tollbooth system. A highly qualified U.S. vendor, who had done the work before, protested the award to the USTR. Unfortunately, the contract had already been performed, and the award could not be reversed. Norway acknowledged the mistake and agreed not to repeat it. However, the same scenario occurred again eight months later when a similar automated tollbooth system was purchased for the Norwegian city of Trondheim. USTR took the U.S. vendor's complaint through the formal dispute settlement process and won, but there was no financial reward; contract performance had already been completed once again. Fortunately, the U.S. vendor did not expect a financial settlement but rather sought to "secure his international reputation for the work" (Linscott).

B. 1993 Agreement on Government Procurement

1. Overview

The revised Government Procurement Code accord was accepted on December 15, 1993 at the conclusion of the Uruguay Round trade talks associated with the GATT. As with the old Code, member nations specifically acceded to GPC terms--GATT/World Trade Organization (WTO) concurrence does not obligate or entitle a country to the GPC (Kantor February 1994). Initial signatories of the new Code were expected to include Austria, Canada, the European Union (EU)/European Community (EC), Finland, Hong Kong, Israel, Japan, Norway, South Korea, Sweden, Switzerland, and the United States. South Korea is a new entry while Singapore has at least temporarily dropped off (Murphy 1994). The Code will become effective January 1, 1996. South Korea and Hong Kong, however, will not be bound by the new terms until one year later (BNA Trade Daily). Taiwan, the People's Republic of China, and Australia are new countries expected to accede to the Code in the near future (Kantor, February 1994).

The GPC consists of a 35-page code and 200 pages of annexes. The annexes address the Code's coverage including: 1) central government entities, 2) subcentral government entities, 3) other entities, 4) services, and 5) construction work. (BNA Trade Daily) The Code's text has recently been

made available on a limited basis. However, the much more extensive annexes have not been made publicly available because GATT officials hope to incorporate as many covered services and governmental units as possible before formally releasing them.

A number of GPC specifics were still unresolved as of April 1, 1994. The biggest point of debate revolves around subcentral (i.e., state and local) government coverage. This contention will be decided via a series of bilateral agreements (BNA Trade Daily). The United States has only reached complete agreement with South Korea, Hong Kong, and Israel. Agreement is based on reciprocal coverage for U.S. states and foreign subcentral governments. Although the two biggest players, the U.S. and the EU, formed a pact on this issue on April 15, 1994, the U.S.'s final offer only included specified markets in 36 states (these 36 states voluntarily agreed to the AGP)(Linscott). The United States has excluded all transportation services and research and development services from the Code due to their potential sensitivity. Certain aspects of the Uruguay Round coverage will continue to be negotiated in the years to come (Linscott).

2. Improvements

a. Scope and Coverage

The new Code appears to be a substantial improvement over the old Code. The old GPC covered only

central government procurement of goods. With the new GPC, there is also central government coverage of services and construction contracts, as well as some coverage at other levels--states, provinces, departments, prefectures, and even ports, airports, and government owned utilities. The thresholds vary in the 1993 agreement depending on the country and entity. The threshold for U.S. federal government goods and services is 130,000 SDRs. The threshold is 200,000 SDRs for EC central governments and 355,000 for most U.S. state governments. A standard threshold of 5 Million SDRs applies for construction service contracts offered by the EC and U.S. state and federal governments.

b. Tendering Procedures

The new GPC attempts to make the agreement more reciprocal and transparent, but it closely resembles the old code. To ensure equal treatment of eligible foreign suppliers, regulations regarding new specifics of the procurement process have been slightly expanded and clarified. In contrast to the original agreement's broader guidelines, the new GPC contains specific Articles and/or subsections which stipulate rules for tendering, advertising, supplier qualification, specifications, tender documentation, response time limits, bid receipt and opening, contract award, and post-award information. The new agreement provides an even

closer tie to the U.S. Federal Acquisition Regulations (FAR) (Linscott).

c. Bid Challenges

Disputes/Bid challenges have also received new treatment in the 1993 AGP. Compliance with the Uruguay Round's Dispute Settlement Understanding is mandatory in most cases. The Understanding attempts to provide a single, time sensitive, settlement process for virtually all trade conflicts. The right to a panel review and decision is guaranteed. The process requires that statements made to the panel not be confidential and it empowers the panel to obtain expert scientific and technical assistance as needed. The entire dispute settlement process is intended to take less than 16 months. Further actions can be taken for failure to comply with panel judgements under the authority of Section 301 of the Trade Act of 1974.

Perhaps more significantly on the disputes front, the Code now will require that signatories resolve AGP bidders' challenges using *domestic* procedures. *Private* foreign bidders will be able to directly challenge domestic procurements they perceive as not complying with the Code. They will be able to protest on their own behalf using the host country's domestic legal procedures. They will essentially have the same standing as a domestic bidder and will not require their native government's sponsorship.

d. Offsets

For the first time, under Article XVI, the Code prevents using offsets as a condition for contract award. There is an exception for vendors from developing countries. The exception allows offsets to qualify these vendors for bidding, but they cannot be used for award evaluation. Currently, there are no developing countries that have formally signed the Code (AGP) (Linscott).

e. Rules of Origin

The Uruguay Round also reached agreement to standardize Rules of Origin within three years. This will more clearly and usefully define what constitutes a foreign product. The rules will not be applied retroactively.

f. Information Technology

The agreement recognized the need to respond to changes in the automated global marketplace by including a section addressing information technology advances. The parties agreed to consult regarding the impact of such advances and that the AGP should not pose an obstacle to progress. Of particular note was the possible future reduction of the 40 day bid response time (Linscott).

3. Summary

The 1993 AGP improved on the original agreement. Progress was made in all the contentious areas of the Uruguay Round MTN--coverage (particularly services and more government

entities), offsets, tendering procedures, and bid challenges. The negotiators also agreed to review and standardize rules of origin in the near future.

While the 1993 AGP did not establish an absolute most favored nation arrangement, it did create a conditional most favored nation agreement.[6] The annexes represent a series of reciprocal bilateral agreements that approximate the ideal comprehensive agreement, but pepper it with a dose of parochial realism. The 1979 AGP kept trade talks on government procurement alive after the Tokyo Round and the new AGP should achieve the same result. Specific new additions to the AGP are already being discussed (Linscott).

C. Chapter Ten of NAFTA

The North American Free Trade Agreement was signed on December 17, 1992 by representatives of the U.S., Canada and Mexico. It entered into force on January 1, 1994. Chapter Ten of NAFTA is 79 pages long and addresses public contracting. NAFTA's government procurement provisions were significantly influenced if not modeled after the AGP (Muggenberg, p. 295)(Hufbauer, pp.1, 141). It is more directly a reflection of the recent U.S. Canada Free Trade Agreement chapter on government procurement. Mexico, it should be noted, is neither a signatory to the AGP or the GATT

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[6]Conditional MFN is defined as a "*selected* application of trade rules and disciplines..." (Low, p.158).

(Linscott). NAFTA's primary tenet--for the members to treat signatories' goods and services the same as their own domestic products--is directly taken from Article III of the AGP. Similarly, NAFTA parties cannot discriminate against products offered by local subsidiaries when those products originate in Canada, Mexico, or the United States. However, specific rules of origin may be used to differentiate particular commodities listed in Chapter Three of NAFTA. (Muggenberg, p.297)(NAFTA p.3-1 - 3-B-65)(Paul, p.40-41).

1. Scope, Coverage and Annexes

Federal government entities and selected federal government enterprises are required to follow the Code in their public procurement dealings. Unlike the 1993 AGP, state and provincial governments are excluded from coverage. However the parties will "endeavor to consult" during NAFTA's first five years to obtain reciprocal commitments that subcentral entities will abide by Chapter Ten directives (Paul p.40-41).

Procurement thresholds for including public contracts under NAFTA are $50,000 for both goods and services. Construction services face a threshold of $6.5 Million. A special threshold category exists for government-owned enterprises, such as Mexico's energy, postal, railroad, water and port authorities. Their minimum contract amounts are $250,000 for goods and services and $8 Million for

construction projects. All of the above values are indexed to the U.S. inflation rate on a biennial basis.

Including government enterprises, such as Mexico's massive energy cartels--Petroleos Mexicanos (Pemex) and Comision Federal de Electricidad (CFE), is probably the most important achievement of the Government Procurement chapter. Compliance for Pemex and CFE will gradually increase over a ten-year period. A maximum of 50 percent of contracts can be reserved for Mexican bidders in 1994, decreasing by five percent a year and ultimately to zero in 2003. "Risk sharing" contracts by Pemex (i.e., oil exploration contracts) are excluded under the Chapter (Paul p.42)(Muggenberg, p. 302).

Some government services were excluded under the agreement. All three countries excluded transportation, research and development, public utilities and communications. Coverage of all government financial services is excluded under the code as is coverage of Canadian publication contracts. Chapter Ten does not apply to national security related procurement including arms, ammunition and weapons purchases(Hufbauer, p. 141).

Of additional note is the fact that lease agreements are specifically covered under Chapter Ten. Rules are provided to calculate contract values for both fixed term and open-ended rental agreements. Contract splitting to avoid thresholds is also prohibited. (Muggenburg, p.296-297). Procurement of patented pharmaceuticals will be opened

immediately and non patented pharmaceuticals will follow eight years later (Hufbauer, p. 141). Offsets are prohibited with the same verbiage as the 1993 AGP's Article XVI. Due to NAFTA's regional focus, no consideration is afforded to exceptions relating to less developed countries (Muggenberg p.295)(NAFTA p. 10-5). Similarly, Article VI of NAFTA covering technical specifications uses the same language as the AGP to promote performance criteria, international standards and brand-name-or-equal specifications where appropriate (NAFTA p.10-5)(1993 AGP p.11-12).

Articles 1008 through 1016 address procurement procedures which have been expanded from the U.S. Canada Free Trade Agreement and are stricter than the AGP (Paul, p.43). There are great similarities to U.S. Federal Acquisition Regulation (FAR) provisions. Specific areas of the tendering process that were addressed include:

- All suppliers must have equal access to information, especially during the pre-bid stage.
- For fairness, all suppliers must be qualified using a single advertised qualification standard. Bidders must be given the opportunity to come up to standards where time is available.
- Bidders must receive timely notice of the required technical and financial capabilities.
- Changes to approved bidders' lists must be published.
- Invitations to bid must contain all essential elements such as quantity, schedule and options. (Some government enterprise contracts do not have to contain all areas of information.)

- A time period of 40 days is required between the bid invitation and the bid closing date.
- Bid opening procedures closely resemble FAR provisions and specify when a bid is late. Award data must be published and unsuccessful offerors provided with pertinent requested information.
- Bidders cannot be excluded by virtue of never having performed for a member government or within a specific locality.
- Exceptions for limited tendering are delineated (such as sole source procurements to firms with unique capabilities or due to urgency). Records of the limited tenders are required (Muggenberg, pp.297-299) (Paul, pp. 43-45) (NAFTA, pp.10-6 - 10-19).

The NAFTA section on bid challenge allows protests regarding any part of the procurement process through contract award to be presented to an impartial "reviewing authority." NAFTA's dispute settlement procedure is also available as a remedy. (Muggenberg, p. 302) It should be noted that Chapter Ten does not specify bid protest *procedures* (Scanlon, p. 306). The U.S. and Canada can take advantage of existing domestic protest procedures. It is anticipated that U.S. courts will take an active role in ensuring the assigned "reviewing authority" acts consistently within the context of NAFTA and accepted procurement principles. On the other hand, Mexico will need to create a "review authority" and appropriate procedures from scratch. The Mexican courts, who have historically been much more laissez-faire in reviewing Mexican government actions, will need to become actively involved in the process (Paul, p. 46).

Recognizing the complete procurement system renovation required in Mexico, they are allowed a "best efforts" compliance mechanism until January 1995. This provision recognizes that Mexican compliance requires extensive personnel training and a new data collection and reporting system. To the same end, the three parties agreed to meet annually through 1999 to review transition problems and discuss solutions including U.S. and Canadian technical assistance to Mexico (Barrera, p. 302-303).

2. NAFTA Issues

Because NAFTA is similar to the AGP and FAR, Chapter Ten's requirements do not present any new obstacles to the United States or Canada. Mexico, on the other hand, faces a difficult task. It must develop an entirely new procurement system incorporating the specified tendering and protest procedures (Barrera, p. 302).

Energy issues were delicately crafted into NAFTA. (GAO 1993, p.66). Canada and the United States gained by including Pemex and CFE; however, there is a reasonable possibility that these entities may be broken apart or privatized in the ten-year period before 100 percent coverage is required. (Barrera, p. 303).

NAFTA's significant weaknesses are best viewed with an eye to GATT. NAFTA potentially undermines the position of the U.S. and Canada in the GPC by conflictingly facilitating

the U.S. and Canada to prefer a non-AGP member over an AGP member. Mexico is not a signatory to the GPC. In addition, the 1993 AGP met with reasonable success in including subcentral governments. NAFTA does not include state or provincial governments, although it keeps the option open. (Hufbauer, p. 141)

D. HIGHLIGHTS OF THE AGREEMENTS' MAJOR FEATURES

The following table provides a selective comparison of the major features of the 1979 AGP, the 1993 AGP and NAFTA's Chapter Ten.

TABLE I

HIGHLIGHTS AND COMPARISON OF THE AGREEMENTS' MAJOR FEATURES

FEATURE	1979 AGP	1993 AGP	NAFTA
Coverage/ Thresholds	GOODS Central Govt : >150K SDR	GOODS/SERVICES Central Govt: U.S.>130K SDR EC>200K SDR Subcentral: >355K SDR CONSTRUCTION >5 Million SDR	GOODS/SERVICES Federal Govt: >$50K Enterprises: >$250K CONSTRUCTION >$6.5 Million >$8 Million (enterprises)
Nature	Global	Global	Regional

FEATURE	1979 AGP	1993 AGP	NAFTA
Tendering Procedures	General	More detail	Very detailed
Rules of Origin	Rule of "Substantial transformation"	Existing domestic rules. Develop standard rules in 3 yrs.	Existing domestic rules less some commodities
Offsets	Not prohibited	Prohibited (except developing nations)	Prohibited
Developing Nations	Encourages participation	Encourages participation	Does not address
Bid Challenges	Govt must sponsor private bidder in dispute.	Private bidders may use domestic procedures.	Private bidders submit to domestic review authority

IV. DATA PRESENTATION AND ANALYSIS

A. AGP DATA COLLECTION

The variety of procurement data collection systems used by AGP participants has presented continuing problems in measuring the agreement's effectiveness. (GAO, 1983) Statistics are primarily used to quantify the economic benefit that member nations give and receive. As the final Uruguay Round government procurement negotiations were closing, the two principle parties to the agreement--the United States and the European Community--essentially chose not to directly use existing statistical reports. Instead they commissioned an independent but relatively subjective study to establish a timely and uniform data baseline (within realistic constraints). These data would provide the negotiators with more direct comparative information. (Linscott)

1. Existing data collection system

a. Compliance issues

Resident within the goal of monitoring economic benefit is the issue of complying with the terms of the agreement. Data can be used to indicate compliance difficulties, thus setting the stage for investigating suspect contracts and tenders. One major dilemma in using procurement data for compliance and enforcement is that the information is

stale by the time it is published and distributed. The United States historically takes 11 months to report their statistics to the GATT Committee. A majority of member countries take longer. The statistics are still not released by the GATT Committee until they have reviewed member inputs for approximately 12 to 18 months. In 1989, the most recent statistics available on an unrestricted basis were from 1985. (GAO 1990) In April of 1994, the newest public procurement statistics available outside the committee were from 1991. Three year old information can be useful in establishing patterns of noncompliance, but it is basically unusable in preventing in-process violations. (Linscott)

b. Rules of origin

The varying definitions of what constitutes a foreign product in a domestic market precludes taking procurement data at face value. The situation has improved since introducing a standardized report format in 1988 and consolidating EC country reports. However, equating different countries' meanings of foreign origin is still difficult and evaluation is subjective.(GAO 1984, p.45)

c. USTR/GATT Data

Signatories to the Government Procurement Code are required to submit annual statistical reports detailing the total number of government contracts and corresponding monetary value. The annual reports provided by the USTR

office were detailed and extensive, but did not include all data collected since the signing of the 1979 AGP. Generally, recent annual reports include the number and monetary value of government contracts. These statistics are then broken down by procuring government entities, product categories, and by the nationality of contract award recipients. Additional data on single tenders (sole source procurements) are occasionally incorporated. A summary table and comments regarding the data totals are provided below.

TABLE II

ABOVE-THRESHOLD* CONTRACT AWARDS FOR THE U.S., EC+ AND JAPAN

(Values in SDR Millions)

Total Contract Awards	U.S.	%	EC	%	Japan	%
Total number	7611		6118		8072	
Total value	15637		5531		3115	
Contract Award Recipients:						
U.S. Number	7232	95.02	17	0.28	312	3.87
U.S. Value	14162	90.57	31	0.56	89	2.86
EC Number	97	1.27	6070	99.22	864	10.7
EC Value	354	2.26	5356	96.84	215	6.9
Japan Number	39	.51	1	0.02	6079	75.31
Japan Value	40	0.26	0.135	0.00	2653	85.17

* Above the threshold of 150,000 SDRs

\+ Less Greece, Spain, Portugal and the Netherlands due to incomplete data.

(1) United States. Contracts awarded by United States governmental entities above the threshold of 150,000 Special Drawing Rights (about $190,000) totaled 15.6 Billion SDRs in 1991 (USTR 1991, VI, 10a). This compares to 13.9 Billion SDRs in 1989 and 13.1 Billion in 1990. According to 1989/1990 data, above-threshold expenditures make up approximately two-thirds of the total monetary value of U.S. government procurement, so the data suggests a 23 Billion SDR total government procurement market (USTR 1989, VI, 10a) (USTR 1990, VI, 10a). In 1991, 7,611 above- threshold contracts were awarded; United States firms received 7,232 of the contracts worth a total of 14.2 Billion SDRs. The European Community was awarded 97 contracts representing a value of 354 Million SDRs. Japan received 39 contracts totaling approximately 40 Million SDRs.(USTR 1991, pp. 1-2) Nine hundred forty two (942) above-threshold sole source procurements were awarded in 1991 totaling 961 Million SDRs. Eight hundred eighty eight (888) of these, worth 856 Million SDRs, were to U.S. firms; 11 contracts, worth about 8 Million SDRs, were awarded to companies from the EC.(USTR 1991, VI, 16c)

(2) European Community. By comparison, the twelve reporting countries of the European Community reported a total of 6.8 Billion SDRs in above-threshold government expenditures in 1991. The total EC government market, including below-

threshold contracts, amounted to 13.8 Billion SDRs. Statistics were incomplete for the total number of contracts; however, reporting countries provided the following data for above-threshold tenders (GATT EC, p.2):

- Belgium: 129 of 129 contracts totaling 186 Million SDRs were awarded to EC countries. 13 sole source tenders representing 25 Million SDRs were awarded to the EC.(GATT EC, pp. 3-7)

- Denmark: 104 contracts totaling 102 Million SDRs (of 118 contracts totaling 109 Million SDRs) were awarded to EC countries. The United States received 5 contracts worth 2.8 Million SDRs. 26 sole source procurements representing 11.8 Million SDRs were awarded to the EC. (GATT EC, pp. 4-16)

- Germany: 1,072 contracts totaling 797 Million SDRs (of 1085 contracts totaling 809 Million SDRs) were awarded to EC countries. The United States received 3 contracts worth 2.1 Million SDRs. 569 sole source tenders representing 463 Million SDRs were awarded to EC vendors.(GATT EC, pp. 17-23)

- France: 1909 contracts totaling 1.59 Billion SDRs were awarded to EC countries. Only one other contract was awarded -- to the United States for approximately $2 Million SDRs. 790 sole source tenders representing 696 Million SDRs were awarded to the EC. (GATT EC, pp.24-33)

- Ireland: 35 contracts totaling 58.3 Million SDRs (of 37 contracts totaling 77.8 Million SDRs) were awarded to EC countries. The United States received one contract worth 19.2 Million SDRs. Eight sole source tenders representing 4.9 Million SDRs were awarded to EC suppliers.(GATT EC, pp. 34-38)

- Italy: 1170 contracts totaling 705 Million SDRs (of 1174 contracts totaling 709 Million SDRs) were awarded to EC countries. The United States received two contracts worth 1.5 Million SDRs. 387 sole source tenders representing 366 Million SDRs were awarded to the EC. (GATT EC, pp. 39-41)

- Luxembourg: 12 of 12 contracts totaling 7.3 Million SDRs were awarded to EC countries. Four sole source tenders

representing 1.5 Million SDRs were awarded to the EC. (GATT EC, pp. 42-45)

- United Kingdom: 1639 contracts totaling 1.901 Billion SDRs (of 1653 contracts totaling 1.91 Billion SDRs) were awarded to EC countries. The United States received five contracts worth 3.2 Million SDRs. 287 sole source tenders representing 281 Million SDRs were awarded to EC suppliers. (GATT EC, pp. 46-64)

Based on these incomplete data, the United States has won at least 17 1991 European Community contracts, receiving an economic benefit totaling approximately 30.8 Million SDRs.

(3) Japan. Japan's 1991 above-threshold total was 3.1 Billion SDRs out of a total 7 Billion SDR government market (GATT Japan, p. 3). There were 8,072 covered contracts. Of the total, 6,079 contracts totaling 2.65 Billion SDRs were awarded to Japanese bidders. By comparison United States' companies were awarded 864 contracts totaling 215 Million SDRs and EC concerns were awarded 312 contracts with a monetary value of 89 Million SDRs. (GATT Japan, p. 4) Fifty five (55) sole source tenders representing a value of approximately 74 Million SDRs were awarded to Japanese bidders (GATT Japan, p.24).

The annual statistical reports generated by AGP member countries and disseminated by the GATT Committee provide an interesting picture of international procurement, if taken at face value. The overall government markets are huge. By virtue of each country's own report, there are

relatively small pieces of the eligible government pies being awarded to foreign firms.

2. Deloitte and Touche Public Procurement Study

The overwhelming volume of public procurement opportunities among Government Procurement Code signatories is generated by the United States and the European Community. These two principal participants can, in essence, determine if AGP negotiations are consummated or stalemated (Linscott). The timely signing of the AGP in 1993 was facilitated by the United States/EC consensus to use the accounting firm of Deloitte and Touche to develop an international government procurement database. The data would provide subjective, but comparable information that could be realistically and productively referenced by both parties. (Linscott)

a. Methodology

The Deloitte study, released in April 1994, provided trade representatives from the United States and the European Union with:

> ...an assessment of the value and the international bidding opportunities for goods, services, and construction contracts that are likely to be placed in 1995 by each of several thousand entities offered or requested by the U.S. or the EC in the context of renegotiation of the GATT Government Procurement Agreement. The entities covered are at all levels of government including central/federal, regional or state, and local. The study also encompassed utilities (and some state-owned commercial enterprises in Europe). The assessment focused on procurements by those entities which were above certain specified monetary thresholds. (Deloitte, p. 7)

Procurement thresholds closely approximating the AGP thresholds were used in the study. The U.S. thresholds differed slightly from the EC thresholds; however the variance was mutually agreed upon. (Deloitte, p. 7)

The study attempted to impose uniformity in the face of extremely variable data. The study sought to: 1) quantify the "value of contracts awarded" as opposed to "expenditure under procurement contracts" in a given year (from budget accounts); and 2) divide procurement totals into a commodity group (goods, services, or construction services) so as to better measure existing and future coverage under the Agreement. (Deloitte, p. 10)

The study gathered United States central government data from the Federal Procurement Data System (FPDS). France was the only European country to have a comprehensive procurement data system. Understandably, gaps had to be filled in to get a complete picture. Ongoing national and EC procurement surveys were used for five countries. These were pieced with other informative but incomplete data, including data from the Official Journal of the European Union, budgetary accounts, government accounting reports, professional associations, and other independent studies/surveys. Deloitte used their own surveys in late 1993 for almost all cases where reliable central data were not available. The surveys were a validating if not primary information source for EC central and subcentral governments

(save France), the 50 states, the 24 largest U.S. cities and all public utilities. (Deloitte, pp.11-13)

b. United States Data

(1) Federal Government. Deloitte's U.S. data collection effort used the Federal Government's $176,000 goods and services threshold for federal contracts. All U.S. construction contracts were given a procurement threshold of $6.5 Million before considering eligibility for AGP foreign bidding. (Deloitte, pp. 7-8) Using FPDS it was determined that total U.S. Federal Government contract expenditures in 1992 amounted to $180 Billion, but only $62 Billion represented new 1992 contracts; the remainder was from previous years' contracts. (Deloitte, pp. 17-18) Approximately $55 Billion of the $62 Billion was over threshold. A "scrubbed" total of $43 Billion out of this was eligible for reasonable inclusion as an AGP benefit after eliminating excluded product categories (for example, national security).(Deloitte, pp. 19)

An attempt was made to determine the percentage of AGP eligible contracts that would fall under preference programs and set-asides such as small business, labor surplus, 8(a), sheltered workshops, and Buy Indian. 1989 was used as a base year for calculations because it reflected more complete contract life cycle costs. (The majority of the "value of contracts awarded" from this year,

including options, had already been realized by 1993.) By comparison, the scrubbed new contract figure for 1989 was approximately $50 Billion. About 18.2 percent of the scrubbed figure was in fact not fully open to foreign bidding because of these set asides. Preliminary data from 1992 indicated a similar percentage would apply in that year as well. (Deloitte, pp. 21-22) Thus, approximately $35 Billion would be fully open to foreign bidders in 1992.

(2) State Governments. The thresholds for state government entities and utilities were $250,000 for goods and $500,000 for services. All construction contracts were given a procurement threshold of $6.5 Million. (Deloitte, pp. 7-8) The Deloitte study attempted to provide a picture of the overall market for the 50 U.S. States, and a more in-depth look at the 24 States that were definitely included in the U.S. offer to the EC as a part of AGP negotiations in 1993. Procurement procedures and systems differ widely among the 50 state governments. Totals were largely ascertained by surveys in late 1993. They indicated a total state government market of $33 Billion (unadjusted for set-asides in all states). Set-asides, preference programs, and protected entities were more fully assessed for the 24 states included in the U.S. offer at the time of the survey. Programs varied widely. Procurement opportunities for foreign bidders in those States were 71.8 percent of the total as a result of set-asides

(Deloitte, pp. 24-29). If the same rate of dilution applied to all states, the total state government market would be approximately $24 Billion.

(3) Major U.S. Cities. The thresholds for city government entities and utilities were $250,000 for goods and $500,000 for services. All construction contracts were given a procurement threshold of $6.5 Million. (Deloitte, pp. 7-8) Surveys from the 24 largest municipalities indicated that municipal governments represented an eligible market of $8.6 Billion for foreign bidders. No detailed examination of set-aside programs was conducted, however Deloitte estimated that foreign bidders' contract opportunities would be reduced by approximately ten percent. Government-owned utilities serving these 24 cities were also reviewed. Ports, airports, electric, gas and water utilities, and transit/transportation authorities were included. A market of $7.8 Billion was identified (unadjusted for set-asides and Buy-American provisions).(Deloitte, pp. 145-146)

(4) Mandated Buy-American Programs. The Deloitte study included a review of federally supported programs for state and local governments that mandated Buy-America restrictions. These programs included federal aid highway funds, federal transit administration grants, airport improvement grants, waste water revolving fund grants, Rural Electrification Administration (REA) and telephone loans.

(Deloitte, p. 196) The study placed considerable emphasis on these programs because the EC consistently targeted them as a source of U.S. concessions during the Uruguay Round AGP negotiations (Linscott). The following illustrates the extent of discrimination against foreign vendors in each of the programs (Deloitte, pp. 196-197):

- Highway funds for states require a 25 percent award preference for U.S. steel. Steel is an integral component and major cost in highway construction. This offset essentially excludes foreign companies from an $800 Million steel market, about half of which is above threshold. (Deloitte, pp.196-198)
- Mass transit funds require purchases to include 50 percent American components or a 25 percent offset is used for contract award. Foreign competitors are essentially prohibited from a $3.45 Billion market. (Deloitte, pp. 199-200)
- Contracts funded by Airport grants require 60 percent American content or invoke a 25 percent offset. Foreign bidders are all but excluded from a $2.2 Billion market. (Deloitte, pp. 201-202)
- Foreign contractors can successfully bid on waste water grant projects and REA and telephone loan contracts; however, REA uses a six percent offset for evaluating non-American components in evaluation. (Deloitte, pp. 203-206)

c. European Community Data

(1) Central and Sub-central Data. Thresholds for the EC countries were set for the Deloitte study in terms of European Currency Units (ECUs). ECUs are currently equivalent to about 1.18 U.S. dollars. The central government goods and services threshold was set at 125,000 ECUs; goods for other

entities was set at 200,000 ECUs; services for other entities at 400,000 ECUs; and the construction project threshold was set at 5 Million ECUs. The European thresholds are not identical in monetary value to U.S. thresholds but are reasonably similar. They were mutually agreed upon by the EC and United States for purposes of the Deloitte study. (Deloitte, pp. 7-8) Actual GATT negotiations, however, established thresholds that were 13 percent lower. (Deloitte, p. 225)

It should be noted that data quality is poorer for EC countries than the United States. Much of the Deloitte data was inferred from information expressed in terms of expenditures or total project costs versus documented annual contract value. In addition, data had to be retrofitted into an appropriate category--above or below- threshold. In addition, many "enabling arrangements" (similar to a General Services Administration catalog setup) were in place, but not counted as contracts. Similarly, individual purchases of generally small value items were not counted as contracts. (Deloitte, pp. 224-225) Adjusted data for EC countries are reported in Table I.

TABLE III

EC AND U.S. ABOVE-THRESHOLD ANNUAL PROCUREMENT VALUES

(ECU Millions)

COUNTRY	CENTRAL	SUB-CENTRAL	TOTAL
Belgium	410	1850	2260
Denmark	480	1540	2020
France	9080	19450	28530
Greece	760	1910	2670
Ireland	40	80	120
Italy	5280	9130	14410
Luxembourg	75	45	120
Netherlands	980	1540	2520
Portugal	900	1380	2280
Spain	5170	6420	11590
UK	12985	15130	28115
EC	471		471
TOTAL EC	43781	91315	135096
TOTAL US	29661	27966	57627

Existing laws and procedures in a number of EU countries exclude three major procurement sectors from full foreign vendor bi[illegible]. These were: 1) defense sensitive procurements, 2) air tr[illegible] control equipment and systems, and 3) other specifically excluded services. The above numbers were adjusted for these exclusions. Approximately 25 to 40 percent of defense related expenditures could be considered "non-warlike" and thus eligible for foreign bidding. (Deloitte, pp. 219-225)

(2) Utilities. Above-threshold contract totals for publicly owned enterprises in the European Union were calculated to be 37.759 Billion ECUs. Utilities were not broken down by individual countries. The airport market was 1.423 Billion, electrical utilities were 20.235 Billion, ports were 761 Million ECUs, urban transportation was 4.7 Billion, and water utilities accounted for 10.64 Billion ECUs. (Deloitte, pp. 227)

B. ANTICIPATED NAFTA DATA

Actual data related to the effectiveness of the North American Free Trade Agreement generally have not been published. Most data supporting NAFTA related government procurement opportunities consist of state sponsored studies. They address total market size and anticipated expansion. These are only general estimates as to what extent a NAFTA member will capture another signatory's public procurement

market in a given area. The most significant government procurement opportunity involves gradually opening the Mexican petroleum consortium (Pemex) and state electrical commission (CFE) to Canadian and U.S. bidders. This market is scheduled to be 100 percent open in ten years (Hufbauer 1993). Pemex and CFE represent a six to nine billion dollar market, 50 percent of which will open in the first year (USITC 1993).

Much of NAFTA will have no immediate impact on U.S. and Canadian bidders. For example, pharmaceuticals will still be preferentially procured by most of the effected major Mexican government agencies until the year 2002. Similarly, NAFTA does not effect the preferential U.S. procurement policy for defense related bearings; they are only purchased from Canadian or domestic sources. (USITC 1993)

C. International Bidding Potential and Data Interpretation

1. Overall Market Potential

Potential trade growth motivates any free trade agreement. Opening market segments to foreign bidders under GATT was reviewed in the Deloitte study. The objective was to measure all available enhanced trade possibilities between the U.S. and EC; and this in turn would roughly correlate to growth in public sector procurement. American and European trade associations were consulted for their judgments on the public sector procurement potential in their specific commodity or service markets. The information showed the

massive markets for individual goods and services. Openness to foreign suppliers and research and development expenditures held promise for would-be foreign traders. (Deloitte, pp. 302-308)

Services were carefully addressed since they were not generally included under the 1979 Agreement on Government Procurement. The service sector accounts for approximately 60 percent of economic activity and employment on both sides of the Atlantic (Deloitte, p.309). Only about half of the industry respondents expressed interest in taking advantage of the increased opportunities for business across the Atlantic (Deloitte, p.313). Many businesses were only partially informed, but deterred by perceived obstacles (i.e., U.S. regulations such as the Buy American Act) (Deloitte, P.314). The Deloitte study did not provide commentary on overall market potential as requested by both the U.S. and EC (Deloitte, p.309).

2. Data Interpretation

Measuring the absolute economic impact of the Agreement on Government Procurement is impossible (Anthony, 1979 p. 1342). The data presented in this chapter are incomplete in terms of quantifying the public procurement market, much less the overall market on both sides of the Atlantic. Inaccuracies result from subjective determinations. On the other hand, the information certainly provides a

general picture of the magnitude of public contracting opportunities currently available in Europe and the United States.

In a hypothetical alternative situation that precluded international trade whenever practical, government imports could be zero except in the case of contracts with unique monopolistic foreign suppliers. The probable government market size as estimated in the Deloitte study represents the low end of possible opportunities (since it excludes market expansion due to regular growth and free trade). The potential effectiveness of the original AGP was approximated by measuring the difference between these two figures. While imperfect, this method probably represents the best way to view the more recent but uneven data from the Deloitte study and the GATT annual statistical reports. Interpretation today would have to be the same--that the *opportunities* for economic welfare gains are significant, and far superior to a protectionist reality. (Deardorff, 1979 pp.80-85) It could be more revealing (and perhaps fruitful) to have hard totals for contract value, but using an opportunity based measurement appears to be the ongoing philosophy of GATT and the United States Trade Representative's Office, whether by design or necessity because of low quality data (Jamushian).

V. CONCLUSIONS AND RECOMMENDATIONS

The principal conclusions and recommendations drawn from this research are presented below, followed by answers to research questions and topic areas recommended for further research.

A. CONCLUSIONS

Signatories to trade agreements must, to some degree, believe in the law of comparative advantage as a valid economic theory to rationally expect economic benefit. Protectionist buy-domestic policies are commonly perceived to bring more direct domestic benefit *unless there is an* appreciation of the greater gains to be made by applying the law of comparative advantage and specializing in efficient production and trading. Existing procurement data from the 1979 AGP indicate a substantial government market potentially available to international traders, but are inconclusive in directly supporting the agreement's success or failure. Although convincing facts are needed to rebut a common bias in favor of buy-domestic policies, data on government procurement actions under the 1979 AGP are inadequate for an in-depth comparison of member countries. Inadequacies reflect the variety and/or low quality of procurement data systems and procedures used by signatory nations.

The terms of the 1979 AGP, the 1993 AGP, and NAFTA's Chapter Ten are very similar to one another. They generally address recurrent areas of concern in a similar manner. They each reflect, for their time, the current state of an evolving government procurement code that began with the OECD.

B. RECOMMENDATIONS

The AGP should require standardized procurement data from signatories based on GATT-established uniform thresholds and rules of origin. The best vehicle to achieve this goal would be a GATT-approved automated procurement data system designed to accommodate the existing systems used by members. Justified data would be centrally collated under the auspices of GATT. The Deloitte study could be used as a starting point for such a project because it still provides a timely glimpse of the specific problems encountered with incomparable data.

Procurement data should be published in a form that clearly informs government officials and the general public about the magnitude and reciprocation of government contracts between nations. The information should be used to provide substantive fuel for the debate between protectionists and free trade advocates.

C. ANSWERS TO RESEARCH QUESTIONS

Responses to the subsidiary research questions are provided, followed by the answer to the primary research question.

- What are the purposes of NAFTA and GATT?

NAFTA and GATT promote free trade by removing tariffs and discriminatory domestic procurement practices among signatories. The agreements' ultimate purpose is to increase members' standards of living through an expanded aggregate economy brought about by GATT or NAFTA sponsored free trade among member nations.

- What are the specific features of NAFTA's government procurement chapter and of the AGP?

Both AGPs and NAFTA's Chapter Ten are conditional MFN agreements. Members generally do not receive benefits from another country without a reciprocal obligation to the other country. All three agreements delineate public procurement policies and regulations in order to achieve reciprocity among signatories. Each agreement has consistently focused on the areas of 1) national treatment and non-discrimination, 2) government entities and goods/services covered by the agreement, 3) threshold levels required to invoke the

agreement, 4) rules of origin, 5) detailed transparent tendering procedures, and 6) bid challenges.

- What similarities and differences exist between A) the 1979 AGP, B) NAFTA's government procurement chapter and C)the 1993 AGP?

The 1979 AGP served as the foundation for the two subsequent agreements. Both AGPs are globally focused agreements that seek expanded membership and incorporate special treatment for developing nations. NAFTA's Chapter Ten is regional in nature and limited to its three signatories. The 1993 AGP improves upon the 1979 AGP by including new coverage for services and subcentral government entities, a bid challenge procedure that allows protests by private foreign bidders, and an article prohibiting offsets in determining contract award.

NAFTA's government procurement chapter adds more detail than both the AGPs. Like the 1993 AGP (and unlike the 1979 AGP) it covers services and government-owned enterprises, and prohibits offsets. It does not however, clearly mandate a bid challenge process.

- What is the effect of the Buy American Act on intended trade objectives of NAFTA and GATT?

GATT largely exists to counter protectionist policies such as the BAA. In sectors where the AGP and NAFTA are in force, the BAA can be waived, thus allowing equal bidding

opportunities to foreign suppliers. Generally, when Buy-America requirements are executed (such as in the Federally funded highway projects cited in the Deloitte study), foreign bidders are effectively deterred from the U.S. public procurement marketplace.

- Has the 1979 AGP been successful in increasing international trade opportunities?

It is impossible to state with certainty that the 1979 AGP has been successful when GATT's existing historical public procurement statistics are used as a basis for the judgment. Even the Deloitte study does not clearly show a rising number or value of public contracts. It concludes by attempting to quantify, without comment, the magnitude of the overall transatlantic market. However, if the world economy, mostly shaped by GATT nations, has expanded in the past fifteen years (which this thesis does not attempt to assert), the AGP may have played a small role in its expansion by promoting an additional but indeterminant number of international free trade transactions in the public sector.

The primary research question is:

- Based on historical data, what is the probable effect on trade opportunities of the North American Free Trade Agreement's government procurement chapter and the Government Procurement Code of the Uruguay Round of the General Agreement on Tariffs and Trade?

The answer to this question cannot be determined with certainty. The inconsistent historical data gathered on the 1979 AGP provide little assistance in determining the trend or extent of international trade opportunities. This judgment must essentially be made, partly on faith, using the same general information and economic theory that was available before the 1979 AGP was in place. The conclusion reached by this thesis, that trade opportunities will increase, is based on the belief that the law of comparative advantage will expand economies in the aggregate and thus increase commercial (and public) opportunities. The contrary conclusion--that trade opportunities will not increase--requires belief in the logic of protectionism: it does not make sense to give away what could be kept at home. Were data available to clearly support either position, it could strongly influence a move to expand international trade agreements or, alternatively, to bolster buy-domestic legislation. As it stands, any near term change in government sector trade opportunities in member countries will reflect the delicately balanced (and currently unquantifiable) effect of the AGP and NAFTA interacting with the buy-domestic policies they are intended to counteract.

D. AREAS FOR FURTHER RESEARCH

The following topics related to this thesis represent possible areas for further research:

- Chronicle and evaluate the U.S. legislation which implements the 1993 AGP. What are its features and relationship to the Trade Agreements Act of 1979?

- Reassess AGP procurement data and data collection systems after implementing the 1993 AGP. Have they improved and what is the economic impact?

- Assess NAFTA procurement data and data collection systems as information becomes available. What is the economic impact?

- Examine the initial use of 1993 AGP bid challenge procedures by private foreign bidders. Were foreign bidders using domestic procedures in a manner similar to and with comparable success as a domestic bidder?

- Evaluate the complete overhaul of the Mexican government procurement system that is in essence required by NAFTA's Chapter Ten. Is Mexico able to meet the requirements of Chapter Ten?

- Study the U.S. states' implementation of the 1993 AGP. Are the varied procurement systems able to comply with the terms of the AGP?

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